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October Term, 1952

No. 582

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Petitioner,

vs.

ELLEN E. ZERMANI, Administratrix,

Respondent.

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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The District Court Trial Judge, Chief Judge Sweeney, did not write any opinion, although he heard and took under advisement defendant's motion for a new trial (R. 168).

The opinion of the Court of Appeals for the First Circuit, by Hartigan, Circuit Judge, appears at pp. 173-182 of the Record, and is reported in 200 F. 2d 240.

(*All Italics and emphases herein are Respondent's.*)

Summary and Short Reply to Petition

This application for a writ is based upon two demonstrably erroneous contentions.

The petitioner repeats the statement throughout its petition, as if it was an established fact, that the Trial Judge did not charge on causation. This is the basic untruth in the petitioner's position.

The Court charged on causation under the Federal Employers' Liability Act five separate times.

Secondly, still repeating this false statement, the petitioner then makes the erroneous contention that the Court of Appeals held that no instructions on proximate causation need be given the jury.

The Court of Appeals held no such thing. The opinion quoted three different portions of the charge on causation, and referred to two other references in the charge. The opinion then went on to say "Appellant seems to think that the charge was *inadequate because it failed to delve into the intricacies of foreseeability and risk,* which underlie the law of negligence and limit the scope of liability".

The Court of Appeals did not hold that there was no need to charge on causation. On the contrary, the opinion quotes from and refers to five separate parts of the charge dealing with causation, and then says that petitioner "seems to think" the charge inadequate because it failed to "delve into the intricacies of foreseeability and risk". A reading of the opinion will show that the appellate court held that the trial judge had properly charged on causation and was not required to delve into further intricacies.

The Court of Appeals opinion (R. 177-179) shows that the Court held that the jury was justified in finding that Conductor McAloon was guilty of causal negligence in "pointing" and "yelling" to decedent, and thus ordering him in the dark at night, to catch the speeding cars on Track 1, to ride them and apply the brake (R. 177)—in the endeavor to do which he was injured and killed as a result of Conductor McAloon's negligence.

And who can justly say that this specific negligence was not the main and principal cause of Zermani's death?

The Court of Appeals held (R. 177) that Zermani would be justified in concluding that he was being given an order to "catch" and ride the speeding cars and apply the brake, and that this was a sufficient basis for the inference of defendant's causal negligence which the jury made (R. 176-177).

The Court of Appeals ruled also herein that the petitioner did not comply with Rule 51 of the Federal Rules of Civil Procedure in presenting this alleged error on appeal herein, and the Court's said ruling and the record herein show petitioner at the trial did not comply with this rule.

The Court stated further (R. 179) that the petitioner's counsel refrained from making a proper response, and did not enable the Trial Court to clarify or correct his statement before the jury retired (R. 180), and that such imprecision on petitioner's part at the trial was destined to produce "confusion as to what is in counsel's mind and what is desired of the Court", and the Court said:

> "We do not think a verdict justified on the evidence and by the trial generally should be upset *when counsel have thus failed to make their*

> *criticisms* of the judge clear to him at the time. Under the circumstances the Court's refusal to add to the original charge was not reversible error." (R. 180).

The petitioner persists in asserting as a ground for reversal, claimed error in the Court's charge on causation, *which it is prevented from asserting here because the record* demonstrates that petitioner did not properly object to the charge as given, or distinctly request any other or further relevant charge—in accordance with Rule 51. The Court of Appeals herein held that petitioner did not comply with Rule 51.

The petitioner has therefore no valid assignment of error here.

The petitioner concedes that the plaintiff-respondent made out a forceful case in negligence against it upon which the jury was entitled to find for the plaintiff. The petition does not claim that the facts did not establish negligence. Petitioner does not attempt to claim the case should have been dismissed. The Court of Appeals specifically stated that there was sufficient evidence of negligence and causation (R. 176).

Petitioner's forced and fatuous claim that any issue was withheld from the jury is completely unfounded. The Court did not decide any factual issue.

When stripped to its essence, the petitioner's claim is that in charging on causation under the Federal Employers' Liability Act, *which Act uses the specific words* "resulting in whole or in part", the Trial Court did not use the words "proximate", "sole", "immediate"—cause, etc.

There are no such words in the statute creating and defining this cause of action.

Congress well knew that such words possibly could be again and again tortured and twisted, by counsel for railroads guilty of causal negligence, in continued efforts to confuse jurors, and even Courts, as they had theretofore,—and probably for this excellent reason, they used no such words, but on the contrary used the ***plain, simple and enlarging words*** "resulting in whole or in part" from the negligence of the defendant, etc.

Statement of the Case

The record of the trial of this action is overwhelmingly saturated with indisputable proof of defendant's many acts of outrageous negligence, which caused Zermani's injuries and death.

The record does not establish any state of facts upon which a verdict might possibly have been rendered in favor of the defendant.

The record shows that the entire switching movement was ordered by the yardmaster in charge to be conducted in a "hurry-up" or "short-cut" negligent manner, which in and of itself constituted basic negligence sufficient to support a verdict, because it necessitated the use of inherently dangerous and improper methods of doing the work (R. 36; 45-47; 66).

The record further shows that as this hurry-up or short-cut method of conducting the movement was put in operation, other separate and distinct negligent acts or omissions were committed, all contributing "in whole or in part" to the ultimate injury and death. Some of these additional negligent acts were the hazardous "kicking" of unattended cars at dangerous speed, the stalling and re-bleeding of improperly bled cars, and the confusing unintelliglble orders transmitted by yelling and "pointing" by the conductor at night in a noisy yard.

In the language of Mr. Justice Black, *"the negligence of the employer may be determined by viewing its conduct as a whole. And especially this is true * * * where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern, and where each imparts character to the others"* (*Blair* v. *Baltimore & Ohio Railroad Co.*, 323 U. S. 600).

John T. Zermani was a freight brakeman on the 11 p. m. to 7 a. m. night switching crew in the New York, New Haven and Hartford Railroad freight yard at Taunton, Massachusetts, on August 25, 1951.

The switching crew consisted of the following men: Francis A. McAloon, conductor; William Howard, brakeman; John T. Zermani, brakeman.

The tracks in the Taunton Yard in the vicinity of the occurrence ran north to south. At the north end of the yard a public crossing, known as Danforth Street, crossed the yard from east to west.

The yard tracks, beginning with track 1 on the west, with the high-numbered tracks further east, were all located south of the crossing. The No. 1 lead track and the switches were north of the crossing (18-19).

The switching movement took place and the injury occurred at 3.45 a. m., Standard Time. It was dark and signals were given by lantern (20; 125).

The Bridegwater freight train, consisting of thirty-two cars, had been backed into the yard and placed on yard track 1 by its road engine, with the caboose on the southerly end of track 1 and the most northerly car two carlengths south of the crossing (44). After backing the train on track 1 the road engine uncoupled and departed. The train brake air line had been in operation

over the road, so that when the engine uncoupled it permitted the air to escape from the train line. This applied the brakes on every car of the standing train and the brakes went into emergency (20-45).

Three cars in the Bridegwater train were to be switched out of that train and placed on track 6 (45).

Yardmaster Tetlow wrote out a switching list and delivered it to McAloon, the conductor of the switching crew (45), and gave Conductor McAloon orders to switch the three cars out of the Bridgewater train on track 1 and place them on track 6, and at the same time gave him specific and definite instructions as to the method to use in switching those cars (45).

Since, as previously stated, when the road engine cut off from the Bridgewater train and released the air, the brakes went on, on all of the cars in the Bridegwater train (45), the normal, customary and proper method (36) of conducting the switching operation would have been for the switching crew to go down while the cars were still on track 1, and before any were moved, and bleed the air out of each and every car, and then pull the ones to be switched north of the Danforth Street crossing with the switching engine and switch them from there with the air all out of them (45), because to switch cars the air would have to be out of them.

However, on this occasion Yardmaster Tetlow specifically instructed and directed Conductor McAloon not to follow this customary safe method because they were in a hurry and anxious to get the cars, and because it takes quite a while to bleed each car, a minute or so more or less (45-57). He ordered him to go on track 1 and couple up his engine to the standing cars and have the switcher pump air back into the train line of the cars to be switched, and thereby release all the brakes, and then pull them

north up the lead, and to bleed them from there as they were switched. That is, he told McAloon not to bleed the cars until he got north of the crossing, which required the cars to be switched to be bled by McAloon during the progress of the switching operation (46-47; 66).

When they are not in a hurry they bleed all the cars while they are still on track 1 and before they are pulled up to be switched (46, 36). If the cars are all bled properly on track 1, there would be no cars stuck because of air in them (126).

The yardmaster, Tetlow, gave the orders, and after that the conductor, McAloon, was in charge of the train, the brakemen and the movements (123; 22). Tetlow, acting as yardmaster, was and had been a clerk for twenty-one years and performed all the clerical duties in addition to acting as relief yardmaster (68, 44).

After receiving these orders from Tetlow, McAloon's switching engine backed down on track 1 and cut off twenty-two cars and pulled north over Danforth Street and the lead switch (21).

Emil A. Berube, a brakeman, was on duty at the Danforth Street crossing as both crossing tender and switchman. It was his duty not only to operate the crossing gates but also to throw the hand operated switches leading from No. 1 lead track north of the crossing into track 1 and into track 6. His switchman's shanty was just north of the crossing and on the east side of the No. 1 lead track (17-19).

When the twenty-two-car drag stopped north of the crossing, Conductor McAloon, in the presence of Berube, told his brakemen, Zermani and Howard, what the moves were going to be (22, 37; 78-80).

The witnesses testified that the orders were as follows:

First move:

Cut off the most southerly or twenty-second car, a New Bedford car, and kick it down into track 6. Zermani was instructed to ride this car down into track 6.

Second move:

The next four cars were to be ridden down into track 1 by Brakeman Howard. McAloon instructed Howard to stop the cars only three carlengths south, to leave enough room for three more cars to be switched into track 1 after the next move.

Third move:

The next car to be kicked down track 6. (This was the sixth car from the southerly end of the twenty-two cars that had been pulled out of track 1, and was the second of the three cars to be put on track 6.)

Fourth move:

The next three cars to be kicked into track 1 against the four switched into track 1 on the second move.

Berube testified that in that Taunton Yard there is quite a steep downgrade south of Danforth Street crossing, and every car, as a rule, that goes down into the yard has to be ridden down to use the brake to slow up, regulate and control the movement of the car (23).

Howard testified he did not know the three cars on which Zermani was injured would be sent down without anyone riding them (75).

After the orders, the first move was made, and Zermani rode the first car cut off down into track 6 and started to walk up to the crossing again (23-24).

The second move was made with the next four cars being cut off by McAloon and ridden by Brakeman Howard into track 1, but, although Brakeman Howard was attempting to stop them three or four carlengths south, he could not stop them in time and until they were about ten or twelve carlengths south, or seven or eight more carlengths than intended and as he had been instructed (72, 74, 75).

The third move was then started. The single car for track 6 was cut off by McAloon and kicked toward track 6, but, because the air had been insufficiently and improperly bled, it stopped and stalled because of an application of its own brakes just south of the crossing, and blocked any other movements down toward track 6 (24-25).

After this car stalled because of the improper bleeding of the car, Berube testified that Zermani walked up north toward the crossing to the stalled car, noticed it stopped there, and bled the stalled car. It takes forty seconds or a minute, more or less, to bleed a car (26, 38-39).

The area of the yard where Zermani was standing was lighted by a floodlight and McAloon could see Zermani bleeding the stalled car on track 6 (34), and McAloon did see him bleeding that car (139).

Before the three cars which were to be switched into track 1 as the fourth move to follow the four cars already sent down there were actually released or cut off, Berube heard the brakes squealing and noticed air was in those cars and that they also had not been properly bled, and he "hollered" to the conductor and he stopped the move, and Berube and the conductor bled those cars (29-30; 37-38).

Up to that time Zermani was bleeding the car stalled on track 6 (38-39). After he had bled it, the three cars were kicked down (26-27; 39). At that time Zermani was standing alongside the car (26).

McAloon cut the three cars off, the train stopped, and the cars kept going, and just about that time Zermani stepped up on the crossing, after finishing bleeding the stalled car on Track 6, while there was about one-half a carlength of the last of the three moving cars still on the crossing, when McAloon pointed in the direction of the car and yelled. McAloon pointed south, which was also the direction of the crossing and of track 1 on which the three cars were moving, and yelled, according to Berube's understanding, "Bleed that car." But Zermani had already bled the car. When McAloon yelled there was noise (27). Zermani immediately went into action. There was half a car left on the crossing. He had to wait until that car cleared the crossing and he started down to catch those three that were running on track 1. He ran around the rear end of the car and down the other side (40) to get the ladder where the brakes were, and the last Berube saw of him he saw his light go up in the air as if he was climbing a ladder (28), and the cars came together hard against the four cars on track 1, and he heard somebody holler and moan (30). The cars hit or "registered" with a loud impact and noise (31, 35) and all seven cars went down the track five or six carlengths into the standing cars (35).

The three cars were travelling at 12 to 15 miles per hour, whereas the usual yard speed was 4 miles per hour (31).

Howard had ridden the first four cars into track 1 and set the handbrake (73, 77) and got on top and saw the three cars coming down on top of him (83). When he saw them coming fast he got off, "he unloaded," because

they were coming fast (74) and gradually picking up speed (75) and he got to the ground in safety before they hit or registered with a loud noise (76). When they hit the standing four cars they started them up, and all seven cars went down against the others down there (77). Howard did not know the three cars were to be sent down without anyone riding them (80).

Howard did not see Zermani getting on the cars at all (73).

When the cars struck and Berube heard Zermani "holler" and "moan", he ran down (30-31). Zermani was between track 1 in the yard and track 2, the track to the right of track 1 looking south, about 175 feet south of the crossing to 300 feet roughly (32, 35, 54), about 2 feet away from the rails. There were little pools of blood around where his legs lay. It appeared as though the left leg was cut below the knee, and his instep back of his heel and the muscle part of his right leg was all cut out (33). He was conscious. Berube called for some coats to wrap his legs and he supported Zermani while they waited fifteen minutes for an ambulance to come (33, 59, 76). All this time the conductor stayed at the crossing and never came down near the injured man (34).

The evidence also established that in railroading there are two methods of switching cars. In one, called "droping," the engine backs easily, then stops as the cars are cut off and roll slowly and easily to the assigned track. The second method, called "kicking," involves a fast racing of the engine and a hard, quick, backward motion of the engine as the wheels race, and when the car is cut off it is propelled rapidly down the assigned track at a much faster rate of speed (140-142; 147-148; 132).

The conductor admitted that "kicking" cars in railroad yards is an inherently dangerous practice (134).

In this movement the faster, more rapid and more dangerous kicking method was employed and the cars were "kicked" (140, 141-142, 144, 131). As a result, the three cars involved went at 12 to 15 miles per hour instead of the usual customary speed of 4 miles per hour (31).

The principal witness called by the defendant was Conductor McAloon. He admitted at page 131 that they "kicked" the cars. He admitted that the car stalled on track 6 because it was improperly "bled" (127), and that the three cars for track 1 had to be bled because all the air had not been bled out (134). He admitted that the purpose of bleeding was so that cars would run easily and freely (134). He finally made the astounding admission that—

> "X-Q. You were letting three cars down on 1 and your story is you told him to bleed a car on 6 that had nothing to do with this thing; is that correct? A. That's right.
>
> "X-Q. And a car which you had previously seen he had bled; is that right? A. Yes, sir" (138-139).

Tillson, the fireman, was called as a defendant's witness and admitted the cars were kicked (139-140).

Edwards, the engineer, was called as a defendant's witness and at first testified that the cars were dropped, but on cross examination admitted that *two days after the collision* he had admitted to the safety man and the eight railroad representatives that the cars were kicked (142-143).

POINT I

The record is saturated with abundant proof from which the jury was justified, if not compelled, to conclude that Zermani's injury and death resulted "in whole or in part" from the negligence of the defendant, not only by viewing the railroad's conduct as a whole, but also from the specific and positive acts of negligence committed during the switching operation.

Reargument as to these facts by sophistry and the introduction of dialectic subtleties in an appellate court is not permitted to overturn the conclusions of the jury on those questions of fact and inference (Coray v. Southern Pacific Co., 335 U. S. 520).

(A) TETLOW, THE CLERK ACTING AS RELIEF YARDMASTER, WAS GUILTY OF FUNDAMENTAL AND BASIC NEGLIGENCE IN ORDERING McALOON TO CONDUCT THE SWITCHING OPERATION BY A QUICK, SPEEDY AND "HURRY-UP" METHOD TO SAVE TIME (45-57), VIOLATING THE RAILROAD'S OBLIGATION OF CONDUCTING ITS WORK BY SAFE METHODS AND OF GIVING ZERMANI A SAFE PLACE TO WORK. ALL THE SUBSEQUENT NEGLIGENT ACTS OF CONDUCTOR McALOON THAT WERE COMMITTED WHILE HE CONDUCTED THIS BASICALLY NEGLIGENT TYPE OF OPERATION WERE PART OF THE UNSAFE AND DANGEROUS OPERATION THAT FORMED A SINGLE INDIVISIBLE PATTERN, ALL DESIGNED TO ACCOMPLISH SPEED.

See *Blair* v. *Baltimore & Ohio Railroad Co.*, 323 U. S. 600, in which the Court said, at page 604:

> "The duty of the employer 'becomes "more imperative" as the risk increases.' *Bailey* v. *Central*

Vermont R. Co., 319 U. S. 350, 352, 353. See also *Tiller* v. *Atlantic Coast Line*, 318 U. S. 54, 67. The negligence of the employer may be determined by viewing its conduct as a whole. *Union Pacific R. Co.* v. *Hadley*, 246 U. S. 330, 332, 333. And especially is this true in a case such as this, where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern, and where each imparts character to the others."

In *Tennant* v. *Peoria & Pekin Union Railway Co.*, 321 U. S. 29, the Court said, at page 34:

> "To this evidence must be added the presumption that the deceased was actually engaged in the performance of those duties and exercised due care for his own safety at the time of his death. *Looney* v. *Metropolitan R. Co.*, 200 U. S. 480, 488; *Atchison, T. & S. F. Ry Co.*, v. *Toops, supra*, (281 U. S. 356); *New Aetna Portland Cement Co.* v. *Hatt* 231 F. 611, 617."

In *Bailey* v. *Central Vermont Railway, Inc.*, 319 U. S. 350, the Court said, at page 352:

> "At common law the duty of the employer to use reasonable care in furnishing his employees with a safe place to work was plain * * *. That rule is deeply engrained in federal jurisprudence * * *. As stated by this Court in the *Patton* case, it is a duty which becomes 'more imperative' as the risk increases. 'Reasonable care becomes then a demand of higher supremacy, and yet in all cases it is a question of the reasonableness of the care—reasonableness depending upon the danger attending the place or the machinery.' * * *. It is that

> rule which obtains under the Employers Liability Act * * *."

In the second *Tiller* opinion, 323 U. S. 574, the Court said, at page 579:

> "The backward movement of cars on a dark night in an unlit yard was potentially perilous to those compelled to work in the yards. *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29, 33. And 'The standard of care must be commensurate to the dangers of the business.' *Tiller* v. *Atlantic Coast Line R. Co., supra* (318 U. S. 67)."

(B) THE ORDER NOT TO FOLLOW THE USUAL AND CUSTOMARY METHOD OF BLEEDING ALL THE CARS ON TRACK 1 BEFORE THEY WERE PULLED NORTH OF DANFORTH STREET, WHICH WOULD HAVE INSURED THAT ALL THE AIR WAS OUT OF THE CARS AND THAT THEY WOULD THEREFORE RUN FREELY AND NOT STALL, BUT, ON THE CONTRARY, TO PUMP AIR IN THE TRAIN LINE BY THE SWITCHER AND BLEED THE CARS AS THEY WERE TO BE SWITCHED, WAS NEGLIGENCE FROM WHICH ZERMANI'S INJURY AND DEATH WERE DUE "IN WHOLE OR IN PART" (45-47).

This order resulted in the stalling of the car on track 6, thus placing Zermani in a position where he received a conflicting and confusing order upon which he boarded the three moving cars on which he was injured. The order resulted in McAloon yelling unintelligible orders about a car Zermani had just bled, and the pointing in the direction of the rapidly moving cars.

(C) THE FAILURE OF McALOON TO PROPERLY BLEED THE CAR THAT STALLED ON TRACK 6, WHICH PREVENTED THE CAR FROM RUNNING FREELY AND CAUSED IT TO STALL, BLOCKING ANY OTHER MOVEMENTS INTO TRACK 6, WAS NEGLIGENCE FROM WHICH ZERMANI'S INJURY AND DEATH WERE DUE "IN WHOLE OR IN PART."

Another element of negligence that fitted into the general pattern was the failure to properly bleed and the stalling of the car on track 6.

The second "kick" of a car down track 6 was part of the series of movements that constituted the entire switching movement. The car stalled because it was not bled properly. The purpose of proper bleeding was to permit the car to run freely, which it was required to do in the proper conduct of the switching operation (46, 36, 126). It stalled and had to be re-bled below the crossing to permit the switching operation to continue. It placed Zermani in the position he was at the time the three moving cars sped over Danforth Street and set up the basic situation that was involved in the order transmitted by McAloon by yelling and pointing (27), and created the situation under which the jury was entitled to conclude either that, when McAloon pointed, he did not use the words claimed, "bleed that car," but, on the contrary, ordered Zermani to "get that car" and chase and board the cars moving at an excessive speed, or to conclude, on the other hand, that Zermani, without any fault on his part, because of the noise and the fact that McAloon knew Zermani had already bled the car on track 6 (139), misheard or misunderstood the vocal part of the order and obeyed the pointing and ran after the moving cars.

(D) THE "KICKING" OF THE CARS, AN "INHERENTLY DANGEROUS OPERATION," AND THE FACT THAT THE CARS WERE KICKED AT THE EXCESSIVE SPEED OF 12 TO 15 MILES PER HOUR IN VIOLATION OF THE CUSTOMARY SWITCHING SPEED OF 4 MILES PER HOUR, CONSTITUTED NEGLIGENCE FROM WHICH THE DECEDENT'S INJURY AND DEATH WERE DUE "IN WHOLE OR IN PART."

The record shows proof, beyond dispute, that the cars, instead of being dropped easily, were "kicked" by a rapid, hard, backward motion of the engine at a dangerous and excessive rate of speed (139-140, 144, 131) of 12 to 15 miles per hour in violation of yard speed regulations of 4 miles per hour (31).

Here again is another part of the speedy hurry-up movement requiring "kicking" and excessive speed.

The kicking of the cars in a railroad yard was admitted by the conductor to be an inherently dangerous practice (134).

The fact that the cars were kicked and were going at a dangerous and excessive speed *"in part"* caused the injury and death for two specific reasons:

First, since the cars were going so fast Zermani, when he saw McAloon point and yell, would, because of the speed, reasonably be led to believe that McAloon was ordering him to run after and board the cars. This is particularly so since Zermani knew that Howard had ridden the first cut of four cars down track 1 and that Howard was or might be on those cars, and that Howard, the cars themselves or their contents might be seriously damaged because of the violent impact of the speeding cars. Zermani could reasonably have concluded that someone was required to catch and ride those cars and that he was being ordered so to do because he was the nearest

man to them—in fact, the only man near them—particularly in view of the testimony of Berube that all cars must have a man riding them because of the grade (23), and Howard's testimony that he did not know the three cars were to be sent down without anyone riding them (80).

Second, the jury also were justified in concluding that the kicking and speed of the cars directly caused the injury and death because the kicking and speed caused the cars which Zermani was riding to violently crash into the four standing cars with a hard impact, hurling Zermani off the ladder and under the wheels.

Kicking of cars has been judicially held to be an obviously dangerous method of conducting a switching operation. In *Doing* v. *New York, Ontario & Western R. Co.*, 151 N. Y. 579, it was said, at page 584:

> "The jury could have found from the evidence that the practice of kicking or shunting cars upon these tracks in the direction of the doors of the repair shop was known to the defendant. The danger to be apprehended from such a practice was so obvious that the defendant, in the proper discharge of the duties which it owed to its employees, was bound to guard against it by proper rules and regulations, so far as that was reasonable and practicable. (Abel v. D. & H. C. Co., 128 N. Y. 662; Morgan v. Hudson River O. & I. Co., 133 N. Y. 670; Berrigan v. N. Y., L. E. & W. R. R. Co., 131 N. Y. 582.)"

Conductor McAloon conceded as a matter of fact that switching was inherently dangerous:

> "X-Q. Don't you know that kicking cars in railroad yards is an inherently dangerous practice? A. Oh, yes." (134.)

(E) THE CONFUSING, UNINTELLIGIBLE AND ERRONEOUS ORDER OF CONDUCTOR MCALOON, TRANSMITTED BY YELLING AND POINTING DURING THE COURSE OF A SPEEDY SWITCHING OPERATION AT NIGHT IN A NOISY YARD, CONSTITUTED NEGLIGENCE FROM WHICH ZERMANI'S INJURIES AND DEATH WERE DUE "IN WHOLE OR IN PART."

The record is clear, and the defendant concedes, that, before McAloon pointed and yelled, Zermani had completed bleeding the car that had stalled on track 6, and McAloon, himself, concedes that when he gave the order he knew that Zermani had already bled the car on track 6 (139).

At the time McAloon pointed and shouted, the switching movement was in progress. It was at night and dark. A string of three cars were rolling unattended over the crossing where Zermani was standing, at 12 to 15 miles per hour. The engine was backing and pulling. The cars and couplings between the cars were moving, all necessarily creating a considerable amount of noise (27-28). In this confusion McAloon pointed south, the direction of the stalled car, the crossing, track 1, the three moving cars (27), which at the moment were just going across the crossing, and Zermani. Zermani, the stalled car and the moving cars in track 1 *were all within a* 10° *arc, as shown in Exhibit* 2 (161). It would be difficult, if not impossible, to exactly decide whether McAloon was pointing at the car on track 6 or the three moving cars. Since the part of the movement in progress at the moment was the three moving cars, it would be reasonable for Zermani to conclude that he was being given an order about them, and not an order to do something he had just finished. When McAloon yelled in the noise he was supposed to have said: "Bleed that car" (27, 40-41). Yet, it is conceded that Zermani had just finished bleeding the car on track 6, and since

Zermani was dead and the persons testifying were all employees of the defendant, the jury was not compelled to believe that those were the words yelled, but was entitled to conclude that McAloon yelled something about the moving cars, or that Zermani reasonably misunderstood what was yelled, and might have thought he yelled: "Get the cars." This is particularly so in view of McAloon's testimony:

> "X-Q. You were letting three cars down on 1 and your story is you told him to bleed a car on 6 that had nothing to do with this thing; is that correct? A. That's right.
>
> "X-Q. And a car which you had previously seen he had bled; is that right? A. Yes, sir." (138-139)—

and in view of the testimony of Berube that all cars that go down to that yard have to be ridden because of the grade (23), and in view of Howard's testimony that he did not know that the three cars would be sent down without anyone riding them (80).

From all this evidence the jury was justified in concluding that, when McAloon pointed and yelled, Zermani understood he was ordering him to catch the cars on track 1 to ride them and apply the brake.

This erroneous, confusing order by McAloon certainly constituted negligence from which Zermani's injuries and death were due "in whole or in part".

In *Wilkerson* v. *McCarthy*, 336 U. S. 53, the Court said, at page 61:

> "But the issue of negligence is one for juries to determine according to their finding of whether an employer's conduct measures up to what a reasonable and prudent person would have done under the same circumstances. And a jury should hold

> a master 'liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances,' bearing in mind that 'the standard of care must be commensurate to the dangers of the business.' *Tiller* v. *Atlantic C. L. R. Co.*, 318 U. S. 54, 67."

See *Blair* v. *Baltimore & Ohio Railroad Co.*, 323 U. S. 600, in which the Court said, at page 604:

> "We cannot say as a matter of law that the railroad complied with its duties in a reasonably careful manner under the circumstances here, nor that the conduct which the jury might have found to be negligent did not contribute to petitioner's injury *'in whole or in part.'* Consequently we think the jury, and not the court should finally determine these issues."

See *Bailey* v. *Central Vermont Railway, Inc.*, 319 U. S. 350, where the Court said, at page 353:

> "The jury is the tribunal under our legal system to decide that type of issue (*Tiller* v. *Atlantic Coast Line R. Co.* [318 U. S. 54]), as well as issues involving controverted evidence. *Jones* v. *East Tennessee, V. & G. R. Co.*, 128 U. S. 443, 445; *Washington & Georgetown* v. *McDade*, 135 U. S. 554, 572. To withdraw such a question from the jury is to usurp its functions.
>
> "The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence.' *Jacobs* v. *New York City*, 315 U. S. 752. It is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act.

Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries."

See *Griswold* v. *Gardner*, 155 F. (2d) 333;

Myers v. *Reading Co.*, 331 U. S. 477;

Morris v. *Pennsylvania R. Co.*, 187 F. (2d) 837.

POINT II

Congress by Statute (F. E. L. A., Sec. 51), created and defined this right of action, and directed liability for injury and death resulting "in whole or in part" from the negligence of any of the railroad's employees. The Court below adequately and correctly charged the jury as to causation of injury and death, in the language of the federal statute (R. 154).

Congress created and defined the cause of action which is the basis of this case under the Federal Employers' Liability Act (Title 45, U. S. C., 51, et seq.), and by its specific wording made the defendant railroad liable for injury or death due "in whole or in part" to the negligence of its employees.

The petitioner herein in its brief and petition disregards the import of the statutory words "in whole or in part" and the legal rulings laid down by the Supreme Court in the interpretation of the statute.

Petitioner has disregarded the long line of Supreme Court decisions which have swept into the discard prior legalistic distinctions that were engrafted upon the law

limiting the full import of the words "in whole or in part" and the supreme right of the jury to decide questions of negligence.

Section 1 of the Federal Employers' Liability Act provides:

> "Every common carrier by railroad while engaging in commerce * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * *for such injury or death resulting in whole or in part from the negligence* of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." (Title 45, U. S. C., Sec. 51; 10A F. C. A., Title 45, Sec. 51.)

The Trial Court in five separate instances in its charge instructed the jury on the question of causation under the Federal Employers' Liability Act. Indeed, it may be truly stated that it would have been impossible to more accurately, plainly and simply charge the jury upon this question.

The portions of the charge dealing with causation are as follows:

At R. 151, the Court charged:

> "The basis of this action is not that a man was injured, *but that a man was injured by reason of the defendant's negligence. There is the basis of recovery.* A railroad or any other employer is not an insurer, he is only liable if there is an act of negligence."

This language accords exactly with *Nagle* v. *Isbrandtsen Co.*, 177 F. (2d) 163 at 164.

At R. 152 the Court said: "Again I say the railroad is not an insurer; * * *."

The Court also charged the jury with reference to the defendant's liability under the Employers' Liability Act, stating that the action is brought under the statute (and leaving out parts which were unimportant), then said that the statute provides as follows, quoting the statute (R. 154):

> "* * * shall be liable in damages to any person suffering injury * * * or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; * * * for such * * * death *resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier,* or by reason of any defect or insufficiency, *due to its negligence, in its cars, engines, appliances, machinery, track,* * * *."

which, of course, includes the very important and fundamental legal provision that the injury or death must necessarily result in whole or in part from the negligence of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency "*due to its negligence,* in its cars, engines, appliances, machinery, track, * * *".

Again the Court, as can be seen at R. 154-155, told the jury:

> "If you find that this man's death was brought

> about *by reason of negligence of the railroad,* then in assessing the damages * * *," etc. * * *

and finally, after charging on the question of damages, and just before concluding the charge, the Trial Court returned to the issue of liability, and as the Court's last words to the jury before it retired, the Trial Court said at R. 158:

> "* * * and what you have got to do is to project your mind back to August 25, to the happening, and from the evidence and the inferences that may logically be drawn from that evidence, decide how the accident happened. *If it occurred by reason of the defendant's negligence, then there is a right to recover.*"

How can anyone justly contend that the trial judge did not charge on causation under the Federal Employers' Liability Act, or contend that the decision of the Court of Appeals held that a charge on causation was not necessary, in view of this record?

A reading of the complete text of the Court of Appeals opinion on this question demonstrates that the Court of Appeals held that the judge did charge adequately on causation, but that the "Appellant seems to think that the charge was inadequate because it failed to delve into the intricacies of foreseeability and risk, * * *". (R. 178):

> "The trial judge quoted the pertinent language of the Federal Employers' Liability Act. He also charged that: 'The basis of this action is not that a man was injured, but that a man was injured by reason of the defendant's negligence. There is the basis of recovery. A railroad or any

> other employer is not an insurer, he is only liable if there is an act of negligence.' The court also instructed the jury: 'If you find that this man's death was brought about by the reason of the negligence of the railroad, then in assessing the damages * * *.'' At least two other references were made to negligence during the rather extensive charge to the jury.''

Congress was probably aware of all the erroneous and sophistical dialectic which had been urged by carriers upon courts upon this question of causation with the probable objective of causing damage to the employee's case; and Congress desired to write this Act in the plainest possible words in the English language, in the hope that the courts would not be deceived by these arguments as to "primary cause," "sole cause," "concurrent cause," "contributory cause," etc.

The general trend of the decisions of the Supreme Court of the United States with reference to the interpretation and applicability of the words "in whole or in part," contained in the statute, have been thoroughly discussed in Point I, and we will only cite a few cases here, particularly with reference to causation.

In *Coray* v. *Southern Pacific Co.*, 335 U. S. 520, the Court said, at page 524:

> "The language selected by Congress to fix liability in cases of this kind is simple and direct. *Consideration of its meaning by the introduction of dialectical subtleties can serve no useful interpretative purpose.*"

See *Eglsaer* v. *Scandrett*, 151 F. (2d) 562, at 565:

> "Perhaps the reconciliation of the earlier ac-

cepted, sometimes called the old-fashioned idea, of 'proximate cause' as the direct or efficient cause of the accident (as would be the district court's illustration of a shock from a defective electrical bell ringer causing injuries and death) in cases where this statute applies, and the conception of proximate cause which now obtains, is to be found in the enlarging phrase of the statute. It provides that if the railroad's negligence *'in part'* results in the injuries or death, liability arises. Under the old concept of proximate cause, that cause must have been direct, the complete, the responsible, the efficient cause of the injury. Contributing and remotely related causes were not sufficient. Now, if the negligence of the railroad has 'causal relation,' if the injury or death resulted *'in part'* from defendants' negligence, there is liability.

"The words 'in part' have enlarged the field or scope of proximate causes—in these railroad injury cases. These words suggest that there may be a plurality of causes, each of which is sufficient to permit a jury to assess a liability. If a cause may create liability, even though it be but a partial cause, it would seem that such partial cause may be a producer of a later cause. For instance, the cause may be the first acting cause which sets in motion the second cause which was the immediate, the direct cause of the accident."

See *St. Louis Southwestern Ry. Co.* v. *Ferguson,* 182 F. (2d) 949, at page 952:

"And as to causal relationship, the court in such a case equally has no right to direct a verdict on legalistic refinements between remote and im-

> mediate causation. *Cf. Carter* v. *Atlanta & St. Andrews Bay Ry. Co., supra,* 338 U. S. 430, 70 S. Ct. at pages 228 and 229. The Federal Employers Liability Act, 45 U. S. C. A., Sec. 51, et seq., which is the vehicle of suit for injury from a violation of a Safety Appliance Act, gives the employee a recovery right, even though the violation has been only 'in part' responsible for the injury. 45 U. S. C. A., Sec. 51. The causal question therefore too must be allowed to go to the jury in every case where there is probative evidence from which it would be rationally possible for any one to be persuaded that the violation has been 'a contributory proximate cause' of the injury. *Coray* v. *Southern Pacific R. Co.,* 335 U. S. 520, 523, 69 S. Ct. 275, 277, 93 L. Ed. 208. *The choice between the conflicting theories of causation, each of which is a rational possibility on some probative fact or facts, is one which the jury alone is entitled to make. Ellis* v. *Union Pacific R. Co.,* 329 U. S. 649, 653, 67 S. Ct. 598, 91 L. Ed., 572."

See *Nagle* v. *Isbrandtsen Co.,* 177 F. (2d) 163, at 164:

See also *Lillie* v. *Thompson,* 332 U. S. 459.

The first and sufficient answer we make to petitioner's present complaint is that the Court accurately, so far as petitioner's causal negligence is concerned, charged the jury at the very start of the charge as follows (R. 151):

> "The basis of this action is not that a man was injured *but that a man was injured by reason of the defendant's negligence. There is the basis of recovery."*

The Court also charged the jury with reference to the defendant's liability under the Federal Employers' Lia-

bility Act, stating that the action is brought under this statute (and leaving out parts which were unimportant), then said that the statute provides as follows, quoting the statute:

> "shall be liable in damages to any person suffering injury * * * or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; * * * for such * * * death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track,—" (154).

which, of course, includes the very important and fundamental provision that injury or death must result in whole or in part from the negligence or "by reason of" or "due to its negligence".

Again at R. 154-155 the Court told the jury:

> "If you find that this man's death was brought about by the reason of the negligence of the railroad * * *", etc.

And again, after charging on damages and just before the jury retired (R. 158):

> "* * * what you have got to do is to project your mind back to August 25, to the happening and from the evidence and the inferences that may logically be drawn from that evidence, decide how the accident happened. If it occurred by reason of the defendant's negligence, then there is a right to recover."

The language used by this Court in *Affolder* v. *New York, Chicago & St. Louis Railroad Co.*, 339 U. S. 96, at pp. 99-100, is applicable to this case:

> "The jury, by its verdict, resolved the question against the respondent.
>
> "We think the charge, taken as a whole, sufficiently informed the jury of the relevant legal rules."

POINT III

The Court of Appeals correctly held that petitioner had not properly complied with Rule 51 of the Federal Rules of Civil Procedure, and therefore did not present any reviewable question or exception as to the Trial Court's charge on causation.

Rule 51 states:

> "* * * No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection * * *."

The only place any reference was made whatsoever by petitioner's counsel, and the only statement to the Trial Court, was contained in the following colloquy:

> "Mr. Moore: On behalf of the defendant, I call attention to the fact that in describing negligence to the jury no mention was made that that negligence should be the proximate cause of the

injury and I ask that the jury be instructed on that.

"The Court: I meant to say that.

"Mr. Moore: I also ask your Honor to charge request No. 8, which you have not.

"The Court: You can have that, exception. I said that negatively. Anything else?" (R. 159).

Request No. 8 does not deal with the manner of charging causation but only affects plaintiff's negligence as the sole cause, and mixes negligence, contributory negligence and causation (R. 159 and 13).

The first part of the colloquy is the only part which the petitioner can point out in its effort to assign error.

In any event, the defendant's *counsel did not ask the Court to so charge* or to repeat its charge in that regard.

Defendant's counsel said nothing further but merely then asked the Court to charge the defendant's eighth request, and the Court merely said: "You can have that, exception." We must assume this exception was given *to the plaintiff*.

The respondent, of course, has the right to insist that this petitioner cannot assign as error the giving or the failure to give an instruction, which it now claims to be erroneous, "unless he objects thereto before the jury retires to consider its verdict", and further "*stating distinctly the matter to which he objects and the grounds of his objection*".

It is perfectly clear that this record shows that the petitioner did not raise these objections before the jury retired to consider its verdict, and did not present the grounds of its objection; and did not even ask the Court to repeat its charge where the Court had at least on five different occasions made it perfectly clear in the language

of the statute that the intestate's injury and death would have to be shown to have resulted in whole or in part from the negligence of the defendant, its agents or employees; and did not except to a failure to further charge but went on to another point.

It is therefore perfectly clear that the greater part of the petitioner's brief claims error or errors not objected to at the trial, and respondent contends that the *petitioner may not now assign any such alleged errors.*

Furthermore, respondent again relies upon the fact that the Court's charge on this proposition that the injury or death must be the result in whole or in part of the negligence of the defendant was entirely adequate.

The Court of Appeals ruled that these remarks to the Court did not constitute a compliance with Rule 51, stating (R. 179-180):

> "The reasonable interpretation of this exchange is that when the trial judge informed counsel that he 'meant to say that', he was indicating that he believed his charge had covered adequately the issue of proximate cause. Counsel refrained from any response to this, but went on to his next objection without further comment. The purpose of Rule 51 is to require the parties to enable the trial court to 'clarify or correct his statement before the jury retires'. McDonald v. Jarka Corporation, 2 Cir., 1944, 144 F. 2nd 53, 54. See Williams v. Powers, 6 Cir., 1943, 135 F. 2d 153; Alcaro v. Jean Jordeau, 3 Cir., 1943, 138 F. 2d 767 and Blair v. Cullum, 2 Cir., 1948, 168 F. 2d 622. Although defendant's counsel did not remain completely silent as in Alaska Pacific Salmon Co. v. Reynolds Metals Co., 2 Cir., 1947, 163 F. 2d 643,

658, yet it does not appear that his objection was clearly stated."

Petitioner makes the *unsound contention that certiorari should be granted because it asserts the ruling below would cause arguments between counsel and trial judge.* What arguments? How would it cause such arguments? After all, this discussion occurred up at the bench entirely out of the hearing of the jury. How was counsel prevented from objecting or excepting?

All petitioner's counsel would have had to say at the bench, if he wished to present the claim he now laboriously attempts to make, and which is now pure "second guessing", was to request the Court to charge that if the company's negligent act or omission merely caused a condition to exist, and that the injury and death did not in whole or in part result therefrom, the jury should find that that was not causal negligence and could not be the basis of a recovery. Of course, he said nothing like that. If he had made such a request, the Court undoubtedly would have said that the jury was so charged. He did nothing of the kind, but merely now wishes to "second guess" the Trial Court. Surely the Court of Appeals was clearly right in holding that there was "no prejudice to the appellant in the charge which affects its substantial rights". (Rule 61, Federal Rules of Civil Procedure.)

In this serious case, where the questions of fact were simple, and where all issues submitted were decided by the jury in plaintiff's favor, and where defendant necessarily concedes that the case was one for the jury, it seems ridiculous for petitioner to seriously contend that certiorari should be granted because the trial judge did not use the words "proximate" or "immediate" cause in his charge to the jury.

Both parties had a fair, full and complete jury trial on all the issues in the case. Even though plaintiff's intestate was dead and unable to testify in his own behalf, a powerful case was made out from the admissions of defendant-petitioner's own employees. Its supervising yardmaster admitted ordering a basically hurry-up, quicker method of doing the work; the conductor, who had charge of the crew, even in his evasive contradictory testimony, admitted he was claiming giving an order to Zermani to bleed a car which he knew Zermani had just finished bleeding.

And it was proved that *he, the conductor, then gave the dangerous and reckless order to Zermani to run after the speeding cars and climb aboard and apply the brake if he could (all of which is hereinabove set forth and discussed in detail), which order of McAloon, the conductor, was the final negligent act which caused Zermani to act as he was thus ordered, and be injured and killed.*

This was the final, main, direct and immediate cause, and the question of fact as to whether McAloon was thus guilty of this causal negligence was submitted to the jury.

Under no possible construction of the evidence could there have been any verdict other than a verdict for plaintiff-respondent.

It seems to be the undoubted truth in this case that there was no error committed in the Court below at all in the admission or exclusion of evidence, in the Court's charge, or any refusal to take such action which would appear to the Court "inconsistent with substantial justice", as is set forth in Rule 61, which further states that the Court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

We suggest that the petitioner cannot justly make any claim of error or prejudice here.

CONCLUSION

The application for a writ of certiorari should be denied.

Respectfully submitted,

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